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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment reserved on: 31.01.2025***

Judgment pronounced on: 07.03.2025

\+ W.P.(C) 15199/2023 & CM APPL. 60759/2023 (Stay)

M/S ISMARTU INDIA PVT. LTD. ...Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Tarun Jain, Ms. Kritika Tuteja, Mr. Devansh Garg & Ms. Sheena Tyagi, Advs.

versus

UNION OF INDIA AND OTHERS ...Respondents

Through: Mr. Gibran Naushad, SCC with Mr. Harsh Singhal, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR

J U D G M E N T

HARISH VAIDYANATHAN SHANKAR, J.

1. The present petition impugns the **Show Cause Notice**[1] dated 01 September 2023 issued under Section 28(4) of the **Customs Act, 1962**[2] by Respondent No. 2 and seeks a suitable writ quashing the same relying on various grounds inter alia, as follows:

i. The impugned SCN dated 01 September 2023 is a subsequent (second) SCN and since a prior SCN, dated 25 July 2023, was already issued under Section 28(1) of the Act, the subsequent

[1] SCN
[2] The Act

SCN (hereinafter "**the impugned SCN**") is bad in Law and not maintainable particularly since the previously issued SCN dated 25 July 2023 was on a similar factual matrix relating to the importation of similar goods. Such a notice, would in fact, constitute a "*change of opinion*".

ii. The impugned SCN does not satisfy the requirements of Section 28(4) of the Act as the same lacks any particulars regarding any alleged (a) collusion (b) deliberate misrepresentation, or (c) the withholding of crucial information. The impugned SCN does not satisfy the mandatory conditions for issuance of the same.

iii. The Petitioner has been making continuous and consistent imports of the very same goods since the year 2016 and it is for the first time that by the previous SCN dated 25 July 2023 and the present impugned SCN that the Respondents have sought to classify the imported goods under a different tariff heading (Parts of Mobile Phones as against Complete Mobile Phones).

iv. The classification by the Petitioner under CTH 85171400/85171219 is held as disputed by the Respondent as the Respondent claims that the said classification is incorrect. Such incorrect classification or declaration by the Petitioner cannot form the basis for a SCN under Section 28(4) of the Act as the same would not fulfill the pre-requisites mandated by Section 28(4) of the Act.

2. The primary grounds raised during arguments by the Respondent in their defence, in respect of issuance of SCN under Section 28(4) of the Act appears to be the following:

i. The Petitioner did not submit the requisite data nor reply and

the same amounts to intentional suppression.

ii. The impugned SCN has been issued under Notification No. 42 of 2019 Customs (NT) dated 18 June 2019 which provides for a supplementary notice to be issued once a notice under Sections 28 or 124 of the Act has been issued under circumstances enumerated therein.

iii. The subject matter of the said SCN is related to different periods and different bills of entries.

ANALYSIS:

3. For convenience, we have reproduced the contents of, besides the common background facts, the two SCNs alongside and underlined the differences between the two, as below:

SHOW CAUSE NOTICE DATED 25.07.2023 (Annexure P-2)	**SHOW CAUSE NOTICE DATED 01.09.2023 (Annexure P-3)**
******	******
"The finding of the Investigation- 9.12 The NCTC has suspected that the declared weight of the good is considerably low. However, the same has been verified and found to be 6610 Kgs against the declared weight of 6633 Kgs which almost tallies. Vide 'Electronics and IT Goods (Requirement for Compulsory Registration) Order, 2021. The MeitY has notified the specific goods on which BIS norms will follow at the time of import. It was found that the said order does not cover parts of mobile phones. The goods mentioned in the alert i.e. BIS Label IN 22*26mm' is only a label meant for affixing after completion of the final product and the same also do not fall	**"The finding of the Investigation-** 9.12 The NCTC has suspected that the declared weight of the good is considerably low. However, the same has been verified and found to be 6610 Kgs against the declared weight of 6633 Kgs which almost tallies. Vide 'Electronics and IT Goods (Requirement for Compulsory Registration) Order, 2021, The MeitY has notified the specific goods on which BIS norms will follow at the time of import. It was found that the said order does not cover parts of mobile phones. The goods mentioned in the alert i.e. BIS Label IN 22*26mm' is only a label meant for affixing after completion of the final product and the same also do not fall

within the ambit of the said order. **Classification of unassembled goods in respect of imported model IT5607:** 9.13 Facts of the case and submissions of the importer reveal that the consignment imported vide B/E No. 2432709 dated 14.09.2022 and invoice no. 0090048807 contains all the parts required for the manufacturing of model No. IT5607 except for the battery and camera module. The goods in respect of model No. IT5607 were examined by the Chartered Engineer, who, vide report dated 29.11.2022, reported that "...they acquire the article shape of a mobile phone and thus, in light of the above, prima facie have the essential characteristics of the article..." Further, an essential feature of a mobile phone is communication between two or more people. All other features, viz. camera, torch, earphone slot, storage capacity, etc., are added features of a mobile phone. Therefore, a mobile phone will essentially remain a mobile phone even without a camera feature. 10. Applicable legal provision in this regard is hereunder: Rule 2(a) The General Rules for The Interpretation of Import Tariff read as follows: "*2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles have the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by*	within the ambit of the said order. **Classification of unassembled goods in respect of imported model IT5607:** 9.13 Facts of the case and submissions of the importer reveal that the consignment imported vide B/E No. 2432709 dated 14.09.2022 and invoice no. 0090048807 contains all the parts required for the manufacturing of model No. IT5607 except for the battery and camera module. The goods in respect of model No. IT5607 were examined by the Chartered Engineer, who, vide report dated 29.11.2022, reported that "...they acquire the article shape of a mobile phone and thus, in light of the above, prima facie have the essential characteristics of the article..." Further, an essential feature of a mobile phone is communication between two or more people. All other features, viz. camera, torch, earphone slot, storage capacity, etc., are added features of a mobile phone. Therefore, a mobile phone will essentially remain a mobile phone even without a camera feature. 10. Applicable legal provision in this regard is hereunder: Rule 2(a) The General Rules for The Interpretation of Import Tariff read as follows: *"2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished articles have the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by*

virtue of this rule), presented unassembled or disassembled."	*virtue of this rule), presented unassembled or disassembled."*
11. In order to find out that the mobile parts imported like the camera, Lens, Cover, Keypad, etc. by themselves have acquired the essential character of a mobile phone, it will be relevant in this context to refer to HSN Explanatory Notes to the Rules of Interpretation and also to the HSN Explanatory Notes to Section XVI thereof for understanding the expression incomplete and unassembled machines. In the Explanatory Notes to Section XVI in HSN, incomplete machines and unassembled machines are of the following types:-	11. In order to find out that the mobile parts imported like the camera, Lens, Cover, Keypad, etc by themselves have acquired the essential character of a mobile phone, it will be relevant in this context to refer to HSN Explanatory Notes to the Rules of Interpretation and also to the HSN Explanatory Notes to Section XVI thereof for understanding the expression incomplete and unassembled machines. In the Explanatory Notes to Section XVI in HSN, incomplete machines and unassembled machines are of the following types:
Incomplete Machines	***Incomplete Machines***
"Throughout the Section, any reference to a machine or apparatus covers not only the complete machine but also an incomplete machine (i.e., an assembly of parts so far advanced that it already has the main essential features of the complete machine). Thus, a machine lacking only a flywheel, a bed plate, calender rolls, tool holders, etc., is classified in the same heading as the machine and not in any separate heading provided for parts. Similarly, a machine or apparatus normally incorporating an electric motor (e.g., electromechanical hand tools of Heading 85.08) is classified in the same heading as the corresponding complete machine even if presented without that motor."	*"Throughout the Section, any reference to a machine or apparatus covers not only the complete machine but also an incomplete machine (i.e., an assembly of parts so far advanced that it already has the main essential features of the complete machine). Thus, a machine lacking only a flywheel, a bed plate, calender rolls, tool holders, etc., is classified in the same heading as the machine and not in any separate heading provided for parts. Similarly, a machine or apparatus normally incorporating an electric motor (e.g., electromechanical hand tools of Heading 85.08) is classified in the same heading as the corresponding complete machine even if presented without that motor."*
Unassembled Machines	***Unassembled Machines***
"For convenience of transport many machines and apparatus are transported in an unassembled state. Although in effect the goods are then a	*"For convenience of transport, many machines and apparatus are transported in an unassembled state. Although in effect the goods are then a*

collection of parts, they are classified as being the machine in question and not in any separate heading for parts. The same applies to an incomplete machine having the features of the complete machine [see Part (IV) above], presented unassembled (see also in this connection the General Explanatory Notes to Chapters 84 and 85).However, unassembled components in excess of the number required for a complete machine or for an incomplete machine having the characteristics of a complete machine are classified in their own appropriate heading."	*collection of parts, they are classified as being the machine in question and not in any separate heading for parts. The same applies to an incomplete machine having the features of the complete machine [see Part (IV) above], presented unassembled (see also in this connection the General Explanatory Notes to Chapters 84 and 85). However, unassembled components in excess of the number required for a complete machine or for an incomplete machine having the characteristics of a complete machine are classified in their own appropriate heading."*
11.1 The importer herein imported the parts designed and manufactured by a foreign entity as per their contracts resulting in merely assembling the parts at the site. Therefore, the operation undertaken by them can be termed a simple assembly operation falling within the scope of Rule 2(a) of the Interpretative Rules.	11.1 The importer herein imported the parts designed and manufactured by a foreign entity as per their contracts resulting in merely assembling the parts at the site. Therefore, the operation undertaken by them can be termed a simple assembly operation falling within the scope of Rule 2(a) of the Interpretative Rules.
11.2 Thus, the above clearly states that imported goods can be used to assemble a mobile device that can be used to communicate or can also be used as a different layout to create a complete set without a camera module.	11.2 Thus, the above clearly states that imported goods can be used to assemble a mobile device that can be used to communicate or can also be used as a different layout to create a complete set without a camera module.
11.3 Whereas, the importer cited the judgment dated 23.09.2008 in the matter of Commissioner of Customs, New Delhi Vs. M/s Sony India Ltd. (Citation 2008(231) E.L.T 385 (SC)) wherein the Hon'ble Supreme Court had dismissed the appeal filed by the department and upheld the decision of the CESTAT Final Order No. 237/2002-B dated 28.05.2002 in Appeal No. C/122/99-B – Sony India	11.3 Whereas, the importer cited the judgment dated 23.09.2008 in the matter of Commissioner of Customs, New Delhi Vs. M/s Sony India Ltd. (Citation 2008(231) E.L.T 385 (SC)) wherein the Hon'ble Supreme Court had dismissed the appeal filed by the department and upheld the decision of the CESTAT Final Order No. 237/2002-B dated 28.05.2002 in Appeal No. C/122/99-B – Sony India

Ltd. vs. Commissioner of Customs, ICD New Delhi (Citation 2002(143) E.L.T. 411 (Tri-LB). However, the facts and circumstances of the case cited by the importer are different from the instant case. In the cited case, the appellant had imported 94 consignments of various components of CTV, whereas in the instant case, goods were brought in a single consignment.	Ltd. vs. Commissioner of Customs, ICD New Delhi (Citation 2002(143) E.L.T. 411 (Tri-LB). However, the facts and circumstances of the case cited by the importer are different from the instant case. In the cited case, the appellant had imported 94 consignments of various components of CTV, whereas in the instant case, goods were brought in a single consignment.
11.4 In contradiction, it appears that the findings in the case of M/s Bird Retail Pvt. Ltd. vs. Commissioner of Customs (Import), ICD Tughlakabad (CESTAT's Final Order No. 50362/2020 dated 24.02.2020 in Appeal No. 51007-09 of 2019) are applicable in the instant case. In this case, the appellant has been importing “Segway” products in CKD condition in the form of very assemblies such as power assembly, transmission assembly, wheel assembly, etc., wherein they have filed bills of entry for assessment and clearance of the imported consignment, declaring the product as “CKD Parts of electrically operated two-wheeler/personal transport – lithium ION battery for captive use." The product has been classified under Customs Tariff Heading 87149990/87144011.The Adjudicating Authority ordered classifying the product under CTH 87119091. The Hon'ble CESTAT, after due consideration, held as under:	11.4 In contradiction, it appears that the findings in the case of M/s Bird Retail Pvt. Ltd. vs. Commissioner of Customs (Import), ICD Tughlakabad (CESTAT's Final Order No. 50362/2020 dated 24.02.2020 in Appeal No. 51007-09 of 2019) are applicable in the instant case. In this case, the appellant has been importing "Segway" products in CKD condition in the form of very assemblies such as power assembly, transmission assembly, wheel assembly, etc., wherein they have filed bills of entry for assessment and clearance of the imported consignment, declaring the product as "CKD Parts of electrically operated two-wheeler/personal transport – lithium ION battery for captive use." The product has been classified under Customs Tariff Heading 87149990/87144011.The Adjudicating Authority ordered classifying the product under CTH 87119091. The Hon'ble CESTAT, after due consideration, held as under:
"22. It can also be seen that as per the interpretative rules to the Customs Tariff Act, the General Rules for Interpretation of Schedule II provide as follows:	"*22. It can also be seen that as per the interpretative rules to the Customs Tariff Act, the General Rules for Interpretation of Schedule II provide as follows:*
“*Rule 2(a): Any reference in a heading*	*“Rule 2(a): Any reference in a*

to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled."	*heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled."*
23. The above-mentioned Rule 2(a) makes it clear that any product which is imported in the form of completely knocked down (CKD) condition, and if such components imported in CKD condition have all the essential ingredients to work as a complete vehicle after assembly, in that case, such components need to be classified as a complete motor vehicle, motorcycle, etc." Therefore, it appears that the ratio of the above judgment is applicable in the instant case.	*23. The above-mentioned Rule 2(a) makes it clear that any product which is imported in the form of completely knocked down (CKD) condition, and if such components imported in CKD condition have all the essential ingredients to work as a complete vehicle after assembly, in that case, such components need to be classified as a complete motor vehicle, motorcycle, etc."* Therefore, it appears that the ratio of the above judgment is applicable in the instant case.
12. The issues were also examined in view of the Notification No. 33/2023-Customs, dated 27.04.2023, submitted by the importer on 18.05.2023 **(RUD-X)** which references Notification No. 11/2022-Customs dated 01.02.2022 and 12/2022-Customs dated 01.02.2023. It appears that the same is applicable in the case of Hearable Devices like speakers and wearable devices like smartwatches and not on mobile phones. Hence, the same doesn't appear to be applicable in the instant case.	12. The issues were also examined in view of the Notification No. 33/2023-Cutsoms dated 27.04.2023 submitted by the importer on 18.05.2023 (**RUD-X)** which Notification No. 11/2022-Customs dated 01.02.2022 & 12/2022-Customs dated 01.022023. It appears that the same is applicable in the case or Hearable devices like speakers & wearable devices like smart watches and not on mobile phones. Hence, the same doesn't appear to be applicable in the instant case.
12.1 Hence, the importer was asked to submit details of consignments for the last two years consisting of PCBA	

along with other items/inputs for the manufacture of mobile phones, vide office letter dated 25.01.2023 (**RUD-XI**), 22.02.2023, and 28.03.2023. 12.2 In response to this office letter, the details of goods imported for the last two years were submitted by the importer vide its letter dated 31.03.2023. However, on perusal of the same, it was noticed that the importer submitted details of Model 'IT5607' only which was the disputed model in the examined BE No. 2432709 dated 14.09.2022, and the details submitted were not in accordance with the prescribed format mentioned in the said letters. 12.3 Further, the importer, vide email dated 11.05.2023 (**RUD-XII**), submitted data regarding details of shipments having PCBA for the past two years. On perusal, the Bill of Entry as submitted by the importer was checked from the ICES system. Accordingly, differential duty has been calculated for the consignments imported in the past 2 years. 13. Initial investigations were around Model No. IT5607. Whereas data submitted by the importer reveals that there has been importation of parts for manufacturing of mobile phones of models other than IT5607, wherein the shipments/consignments contain PCBA and other parts essential for assembly/manufacturing of the mobile phones. In other words, it appears that provisions of General Rules 2(a) would also be applicable in these cases as well. **Redetermination of classification of goods and Computation of Differential duty:**	13. Initial investigations were around Model No. IT5607. Whereas data submitted by the importer reveals that there has been importation of parts for manufacturing of mobile phones of models other than 1T5607 wherein the shipments/consignments contain PCBA and other parts essential for assembly/manufacturing of the mobile phones. In other words, it appears that provisions of General Rules 2(a) would also be applicable in these cases as well. 13.1 The importer was asked to submit import data with respect to past import

14. Details of differential duty calculation in respect of the invoices containing PCBA for the period of the past two years are attached as Annexure A. *** 14.1 From the investigations as detailed above, it appears that the importer has misclassified the CTH of the goods imported vide all invoices as mentioned in Annexure-A in the corresponding Bills of Entry filed by them, resulting in short-payment of duty. Therefore, it appears that the importer has wrongly self-assessed the Bills of Entry mentioned in the Table above under Section 17(1) of the Customs Act, 1962. The impugned goods do not correspond in respect of classification, being a complete mobile set attracting CTH 85171400/85171219 with respect to the declaration given in the Bills of Entry as manufacturing parts of mobile phones. Further, under the provisions of Section 46(4A) of the Act, *ibid*, it is the responsibility of the importer to ascertain the accuracy of the information given in the Bill of Entry. 14.2 In view of the above and submission by the importer, it appears that the goods/mobile parts imported vide invoices for the past two years as mentioned in Annexure A have all the components required for the manufacture of the mobile phone which merit classification under tariff item 85171400 (Applicable BCD @ 20%) instead under differential tariff item of mobile parts. 15. WHEREAS. a Pre-notice	vide this office letter dated 25.01.2023 and in response to the same, the importer submitted import data for last two financial year only vide email dated 11.05.2023. Accordingly, Show Cause Notice No 103/2023-24/Gr. 2G/Pr Commr./ICD-lMP/TKD dated 25.07.2023, was issued to importer. 13.2 Further, the importer was also asked to submit import data of remaining past import. However, it appeared that neither importer submitted any data nor any reply. Accordingly, import data of the importer was retrieved from the ICES 2.0 and it was found that the importer had imported "PCBA for manufacturing of mobile phones" vide Bills of Entry. as detailed in Annexure - A to D attached hereto. **Redetermination of classification of goods and Computation of Differential duty:** *** 14.1 From the above table and as per WCO Tariff, it is observed that complete mobile phones were classifiable under CTH 85171210 (till 31 .12.20 19), CTH 85171219 (after 01.01.2020 to 31.01,2022), CTH 85171400 w. e. f 01.02.2022. 14.2 Details of differential duly calculation in respect of the Invoices containing PCBA for the period starting from 24.08.2018 to 24.07.2023 are attached as Annexure A to D hereto. The summary of the calculation in Annexure A to D, is as hereunder- ***

Consultation letter dated 07.07.2023, in compliance to Pre-notice Consultation Regulations, 2018. notified vide Notification No.29/2018-Cus (N.T) dated 02.04.2018, was issued to importer by this office wherein it was requested to deposit short levy duty amounting to Rs. 5,31,48,005/-, in respect of Bills of Entry. as mentioned in Annexure-A & B. Further, the importer was also informed of the intention to issue the notice under Section 28(1) of the Customs Act. 1962 specifying the grounds on which such notice is proposed to be issued. However, no reply against said pre-notice has been received from the importer till date. ***	14.1 From the investigations as detailed above, it appears that the importer has misclassified the goods viz. Liquid Crystal Module, Microphone, Speaker, Front Cover, Back Cover, Keypad, Paper Sticker, Adhesive Tape, Adhesive Type Foam, Advertising Paper, Antenna, Camera Protective Lens, Conductive Fabric, Speaker Frame, Earphone, Keypad Dome, LCM Protectiveness, Light Emitting Diode (LED), Loaded Printed Circuit Board, Motor, PE bag, Protective Lens, Screw, Tape MYLAR etc.", imported vide Bills of Entry as mentioned in Annexure - A to D resulting in short-payment of duty. Therefore, it appears that the importer has wrongly self-assessed the impugned Bills of Entry under Section 17(1) of the Customs Act, 1962. The Impugned goods do not correspond in respect of classification being a complete mobile set, which merit classification under CTH **85171400/85171219/85171210**, with respect to the declaration given in the Bills of Entry as manufacturing parts of mobile phones. Further, under provisions of Section 46(4A) of the Act, *ibid*, it is the responsibility of the importer to ascertain the accuracy of the information given in the Bill of Entry. 14.2 In view of the above and submission by the importer, it appears that the goods/mobile parts imported vide Bills of Entry, as detailed in Annexure-A to D, have all the components required for the manufacture of the mobile phone which merit classification under Tariff Item 85171400/85171219185171210 instead of under different tariff item of

	mobile parts as declared by importer in impugned bill of entry. ***
17. On perusal of the aforementioned Investigation Report, it is observed that the importer has wrongly classified said goods by suppressing the fact that the said goods are complete mobile set in CKD condition. It was because of the timely intervention of the investigation agency the said fact came to light which proves that the importer had intentionally suppressed the facts and evaded applicable customs duty which resulted in short payment of duty of Rs. Rs.5,30,87,373/-, as detailed in Annexure-A & B, and the same is recoverable under Section 28(1) of the Customs Act, 1962 along with interest under Section 28AA of the act *ibid*.	16. On perusal of the aforementioned Investigation Report, it is observed that the importer has wrongly classified the said goods by suppressing the fact that the said goods are complete mobile sets in CKD condition. It was because of the timely intervention of the investigation agency that the said fact came to light, which proves that the importer had intentionally suppressed the facts and evaded applicable customs duty which resulted in short payment of duty of Rs. 1,11,21,12,551/-,as detailed in Annexure-A to D, and the same is recoverable under Section 28(4) of the Customs Act, 1962, along with interest under Section 28AA of the Act *ibid*.
17.1 The importer by their aforesaid act of omission and commission has contravened the provisions of Section 46(4) and 46(4A) of the Customs Act,1962 in as much they have failed to furnish correct particulars with respect to description and classification of the said goods. Section 111(m) of the Customs Act, 1962 provides that any goods which do not correspond in respect of value or in any other particular with the entry made under this Act, are liable to confiscation. As the importer had mis-declared the value of the goods with an intention to evade proper Customs Duties against the goods imported vide impugned Bills of Entry, as detailed in Annexure-A & B, the same are liable to confiscation under Section 111(m) of the Customs Act, 1962.	16.1 The importer by their aforesaid act of omission and commission has contravened the provisions of Section 46(4) and 46(4A) of the Customs Act, 1962 in as much as they have failed to furnish correct particulars with respect to the description and classification of the said goods. Section 111(m) of the Customs Act, 1962, provides that any goods which do not correspond in respect of value or in any other particular with the entry made under this Act, are liable to confiscation. As the importer had mis-declared the value of the goods with an intention to evade proper customs duties against the goods imported vide impugned Bills of Entry, as detailed in Annexure-A to D, the same are liable to confiscation under Section 111(m) of the Customs Act, 1962.

17.2 Section 112(a)(ii) of the Customs Act, 1962 provides that any person, who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, shall be liable, in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty under this Section. In the present case. the importer has mis-declared description of the impugned goods and evaded applicable Customs Duties in the Bills of Entry, as elaborated in above, and thus, the importer is liable to penalty under Section 112(a)(ii) of the Customs Act, 1962.	16.2 SECTION 114A of the Customs Act, 1962 inter alia provides that where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been partly paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28, shall also be liable to pay a penalty. In the present case, the importer has wilfully suppressed vital facts with respect to the description of the impugned goods in the Bills of Entry, as elaborated above, and thus, the importer is liable to penalty under Section 114A of the Customs Act, 1962, with respect to the said bills of Entry.
18. Now, therefore, on the basis of the discussion here-in-above and investigations into the matter, **M/s. Ismartu India Pvt Ltd**, D-197, 198, 199, Sector- 63, Noida, Gautam Budh Nagar, Uttar Pradesh, 201301 (IEC: 0516984080), is hereby called upon to Show Cause to the Principal Commissioner of Customs, Import Commissionerate, Inland Container Depot, Tughlakabad, Delhi - 110 020, in writing within 30 days of receipt of this notice as to why:-	17. Now, therefore, on the basis of the discussion hereinabove and investigations into the matter, **M/s. Ismartu India Pvt. Ltd**., D-197, 198, 199, Sector-63, Noida, Gautam Budh Nagar, Uttar Pradesh, 201301 (IEC: 0516984080), is hereby called upon to Show Cause to the Principal Commissioner of Customs, Import Commissionerate, Inland Container Depot, Tughlakabad, Delhi - 110020, in writing within 30 days of receipt of this notice as to why:
i. The Bill of Entry No.2432709 dated 14.09.2022, should not be finalized by changing the classification to CTH 85171400 under Section 18(2) of the Customs Act, 1962;	i. The classification of the goods, imported vide Bills of Entry as detailed in Annexure-A to D, should not be rejected and the same should not be classified under CTH 85171219/85171210/85171400 as mentioned in the respective annexures;
ii. Total differential duty amounting to Rs.60,632/- (Rupees Sixty Thousand	

Six Hundred and Thirty Two only), in respect of Bill of Entry No. 2432709 dated 14.09.2022, should not be demanded and recovered from the importer under Section 28(1) of the Customs Act. 1962 along with applicable interest under Section 28AA of the Act ibid; an iii. Penalty under Section 112(a)(ii) of Customs Act, 1962 of the Customs Act, 1962, should not be imposed on the importer for improper importation of goods imported vide Bill of Entry No.2432709 dated 14.09.2022 and evasion of Customs duty thereof. iv. The Bank Guarantee of Rs.37,26,502/- and Rs.3,00,000/-, should not be appropriated towards Fine and Penalty imposed upon the importer in respect of Bill of Entry No.2432709 dated 14.09.2022 **v.** The classification of the goods, imported vide Bills of Entry as detailed in Annexure-A & Annexure-B, should not be rejected and the same should not be classified under CTH 85171400; vi. The goods having re-determined assessable value of Rs.1,46,83,51,738/-, imported vide Bills of Entry as detailed in Annexure-A and Annexure-B, should not be held liable to confiscation under Section 111(m) of the Customs Act, 1962; vii. Total differential duty amounting to Rs.5,30,87,373/- (Rupees Five Crore Thirty Lakh Eighty Seven Thousand Three Hundred and Seventy Three only), as detailed in Annexure - A & Annexure-B. should not be demanded and recovered from the	ii. The goods having an assessable value of **Rs. 5,83,12,84,286/- (Rupees Five Hundred Eighty-Three Crore, Twelve Lakh, Eighty-Four Thousand, Two Hundred and Eighty-Six only)**, imported vide Bills of Entry as detailed in Annexure-A to D, should not be held liable to confiscation under Section 111(m) of the Customs Act, 1962; iii. Total differential duty amounting to Rs. **1,11,21,12,550/- (Rupees One Hundred Eleven Crore, Twenty-One Lakh, Twelve Thousand, Five Hundred and Fifty only)**, as detailed in Annexure-A to D, should not be demanded and recovered from the importer under Section 28(4) of the Customs Act, 1962, along with applicable interest under Section 28AA of the Act ibid; and iv. Penalty under Section 114A/112(a)(ii) of the Customs Act, 1962, should not be imposed on the importer for improper importation of goods and evasion of customs duty.”

importer under Section 28(1) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Act ibid; and viii. Penalty under Section 112a (ii) of Customs Act, 1962 of the Customs Act, 1962, should not be imposed on the importer for improper importation of goods and evasion of Customs duty, in respect of Bills of Entry other than Bill of Entry No. 2432709 dated 14.09.2022;"	
19. This show cause notice is being issued without prejudice to any other action that may be taken in respect of the impugned goods and/or the persons/company etc., mentioned in the notice, under the provisions of the Customs Act. 1962 and/or any other law for the time being in force.	18. This show cause notice is being issued without prejudice to any other action that may be taken in respect of the impugned goods and/or the persons/company etc., mentioned in the notice, under the provisions of the Customs Act. 1962 and/or any other law for the time being in force.
20. The aforesaid noticee are to submit their written reply within the stipulated time. In their reply, they should clearly state whether they wish to be heard in person or not. In case, they do not reply or no such requests is made in their reply or they do not appear before the adjudicating authority on the date and time fixed, without any sufficient cause, the case will be decided ex-parte on the basis of available records without any further reference to them.	19. The aforesaid noticee are to submit their written reply within the stipulated time. In their reply, they should clearly state whether they wish to be heard in person or not. In case, they do not reply or no such requests is made in their reply or they do not appear before the adjudicating authority on the date and time fixed, without any sufficient cause, the case will be decided ex-parte on the basis of available records without any further reference to them.
21. The Department reserves its right to add, amend, modify, etc. this notice based on any fresh facts or evidence which may come to the notice of the Department after the issue of this notice but prior to adjudication thereof.	20. The Department reserves its right to add, amend, modify, etc. this notice based on any fresh facts or evidence which may come to the notice of the Department after the issue of this notice but prior to adjudication thereof.
22. The notices have the option to	21. The notices have the option to

make an application under Section 127(B) of the Customs Act, 1962 prior to adjudication of this notice, to the Settlement Commissioner to have the case settled, in such form and in such manner, as specified in the Rules. 23. List of the documents relied upon in this notice (RUDs) enclosed with this show cause notice is an integral part of this show cause notice which is also being served through email of the noticee. *****	make an application under Section 127(B) of the Customs Act, 1962 prior to adjudication of this notice, to the Settlement Commissioner to have the case settled, in such form and in such manner, as specified in the Rules. 22. List of the documents relied upon in this notice (RUDs) enclosed with this show cause notice is an integral part of this show cause notice which is also being served through email of the noticee. *****

<u>TWO SEPARATE NOTICES UNDER SECTIONS 28(1) AND 28(4) IN SIMILAR CIRCUMSTANCES CANNOT BE ISSUED</u>:

4. A bare perusal would show that the two SCNs are identical in almost every respect except for the differences as highlighted. Apart from the more obvious differences relating to the Notices being under Sections 28(1) and 28(4) and the corresponding penalty provisions being Sections 112 and 114A which are consequential upon the Section under which the notices are issued, some of the differences, *inter alia*, are the periods to which they pertain, the invoices and quantities of the goods therein.

5. Interestingly, both notices conclude that "*the importer has wrongly classified said goods by suppressing the fact that the said goods are complete mobile set in CKD condition. It was because of the timely intervention of the investigation agency that the said fact came to light which proves that the importer had intentionally suppressed the facts* .....", but chooses to invoke Sections 28(1) and 28(4) of the Act, respectively in the two notices.

6. The SCNs also have identically worded paragraphs with

different numbers which further conclude as follows:

> "The importer by their aforesaid act of omission and commission has contravened the provisions of Section 46(4) and 46(4A) of the Customs Act, 1962 in as much they have failed to furnish correct particulars with respect to description and classification of the said goods. Section 111(m) of the Customs Act, 1962 provides that any goods which do not correspond in respect of value or in any other particular with the entry made under this Act, are liable to confiscation As the importer had mis-declared the value of the goods with an intention to evade proper Customs Duties against the goods imported vide impugned Bills of Entry, as detailed in Annexure" _____, "the same are liable to confiscation under Section 111 (m) of the Customs Act, 1962."

7. Section 28 of the Act, as relevant, reads as follows:

> **"Section 28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.**
> (1) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts, —
> (a). the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:
> Provided that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;
> (b). the person chargeable with the duty or interest, may pay, before service of notice under clause (a), on the basis of—
> (i) his own ascertainment of such duty; or
> (ii) the duty ascertained by the proper officer,
> the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid:
> Provided that the proper officer shall not serve such show-cause notice, where the amount involved is less than rupees one hundred.
> ***
> (4) Where any duty has not been levied or not paid or has been

> short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of—
> (a) collusion; or
> (b) any wilful mis-statement; or
> (c) suppression of facts,
> by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.
>
> ***
>
> (7A) Save as otherwise provided in clause (a) of sub-section (1) or in sub-section (4), the proper officer may issue a supplementary notice under such circumstances and in such manner as may be prescribed, and the provisions of this section shall apply to such supplementary notice as if it was issued under the said sub-section (1) or sub-section (4).
> ….."

8. Section 28 of the Act provides for two separate types of notices: - one under Section 28(1) for all notices to be issued where the elements of Section 28(4) of the Act are absent, *namely*, those of collusion, wilful mis-statement and suppression: meaning thereby that it is only in those circumstances where Section 28(4) of the Act is not attracted that a Notice under Section 28(1) of the Act is issued. The other is under Section 28(4) and such a notice may come to be issued provided it fulfils the requirements of the same.

9. Notices under Section 28(1) and Section 28(4) operate in different scenarios and even by an exaggerated stretch, cannot possibly be said to be interchangeably issued.

10. In the present case, a prior notice under Section 28(1) of the Act had already come to be issued, in respect of similar goods, with a similar alleged "*mis-declaration*". Both notices have the benefit of the

reports dated 29 November 2022 and 05 January 2023 by the Chartered Engineer engaged by the Respondents.

11. Surely, two notices with (i) an almost identical factual matrix, (ii) relying upon the same reports by a Chartered Engineer and (iii) with almost identical conclusions cannot result in two different Notices under two different sub-sections, especially when one [*Section 28(1)*] can operate only in the absence of the conditions prescribed in the second [*Section 28(4)*].

12. The issuance of the impugned Show Cause Notice, under the said facts and circumstances, is clearly unsustainable.

CHANGE OF OPINION:

13. The fact that the same officer, within a span of just 6 weeks, presented with an almost identical set of facts, has chosen to issue the two notices under different Sections, would also, in our view taint the impugned SCN with the vice of a "*change of opinion*" and for that reason too, render it unsustainable.

14. We would refer favourably to the judgments of the Hon'ble Supreme Court in respect of "*change of opinion*" as follows:

- State of U.P. v. Aryaverth Chawal Udyog, (2015) 17 SCC 324;
- Commr. of Customs v. G.C. Jain, (2011) 12 SCC 713;
- Prabhu Steel Industries Ltd. v. CCE, (1998) 1 SCC 303.

15. The Hon'ble Supreme Court in ***State of U.P. v. Aryaverth Chawal Udyog, (2015) 17 SCC 324,*** (3-Judges) while contemplating on requisite parameters for *'change of opinion'* by the authorities held that:

> **"29.** The standard of reason exercised by the assessing authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See *Binani Industries Ltd.* v. *CCT* [*Binani Industries Ltd.* v. *CCT*, (2007) 15 SCC 435]; *A.L.A. Firm* v. *CIT* [*A.L.A. Firm* v. *CIT*, (1991) 2 SCC 558]). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.
>
> **30.** In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (*CIT* v. *Dinesh Chandra H. Shah* [*CIT* v. *Dinesh Chandra H. Shah*, (1972) 3 SCC 231] ; *CIT* v. *Nawab Mir Barkat Ali Khan Bahadur* [*CIT* v. *Nawab Mir Barkat Ali Khan Bahadur*, (1975) 4 SCC 360 : 1975 SCC (Tax) 316])."

16. The Hon'ble Supreme Court in ***Commr. of Customs v. G.C. Jain, (2011) 12 SCC 713*** rejected the '*change of opinion*' of the Authorities in the following terms:

> **"29.** In the instant case the respondents had declared the goods as butyl acrylate monomer with correct classification of the same and the word "adhesive" was added in the ex-bond bill as per the respondents' understanding that BAM is an adhesive. In these circumstances it was for the Revenue to check whether BAM was covered by the expression "adhesive" or not and if even after drawing of samples they have allowed the clearances to be effective as an adhesive the respondents cannot be held responsible for the same and subsequently, if the Revenue has

> changed their opinion as regards the adhesive character of BAM, extended period cannot be invoked against them. As such, we are of the view that the demand of duty in respect of the 14 consignments is also barred by limitation."

17. Similarly, the Hon'ble Supreme Court in ***Prabhu Steel Industries Ltd. v. CCE, (1998) 1 SCC 303*** held that:

> **"4.** From the admitted facts of this case there can be no doubt that none of the requirements of the above-quoted proviso is satisfied in the present case to give to the Department the benefit of the larger period of limitation. The removal of the goods was in accordance with the approved classification list and all the material facts were before the authorities concerned. Simply because there was a change in opinion as to the correct description of the input, it cannot be said that the case falls within the ambit of proviso to Section 11-A. Admittedly, there was no concealment of the true facts and the classification list submitted by the assessee had been duly approved under which the removal was made."

SHOW CAUSE NOTICE DOES NOT FULFILL REQUIREMENTS OF SECTION 28(4):

18. In order for the Impugned SCN to survive, it would, independently, have to satisfy the requirements of Section 28(4), which we have already extracted hereinabove.

19. The entire case of the Respondent at Para 16 of the SCN is that the Petitioner "*...has wrongly classified said goods by suppressing the fact that the said goods are complete mobile set in CKD condition*.". This apparently was done intentionally to evade payment of Customs Duty.

20. The records bear out the fact that the Petitioner has made a classification of the goods and in support of the same has disclosed all the relevant invoices and other importation details.

21. The Petitioner's employee had initially made a statement in

respect of the goods. However, the said employee, at a later stage, retracted from the same and the Respondent, considering this "*contradiction*" in the stand of the Petitioner, got the goods examined by a Chartered Engineer for his opinion.

22. The Chartered Engineer gave his opinion and followed it up with a further opinion.

23. Without adverting to the merits of the opinion, the fact that there existed ambiguity in the mind of the Respondent with respect to the correct classification of the goods, which doubt could only be based on a conspectus of all the facts before the parties, itself negates any "*suppression*". This is also evidenced by the fact that the Chartered Engineer, who gave his report, has drawn the samples from the consignments under question, and which goods were already in the Respondent's knowledge. There was nothing new that was brought to the table.

24. The doubt in respect of the classification of the goods was based on the complete disclosure by the Petitioner of the goods imported by it, meaning thereby, that there was no suppression of the relevant facts.

25. Based on the set of facts as they presented themselves, both parties are entitled to make contesting claims. However, a genuine disagreement, as in the present case, of the classification of the goods cannot possibly be elevated to "*suppression*".

26. The Respondents have not referred to "*collusion*" or "*wilful misstatement of facts*" to support the issue of the SCN under Section 28(4).

27. Nonetheless, it is apparent that there is no "*collusion*" and there

cannot even be a "*wilful misstatement of facts*" as all the imported goods with their description were before the Respondent and the entire dispute related to their classification.

28. It would appear that in the present case, there is a mere incantation of the provisions of the Section without any substance to back it up leading to the issuance of two SCNs under sub-sections (1) and (4) of Section 28.

29. In the counter, the Respondents have adverted to the alleged non-submission by the Petitioners of details of their prior imports in support of the allegation of "*suppression*". This is a bogey that needs to be rejected resoundingly. The data allegedly suppressed was data that was available with the Respondents themselves and was in fact, admittedly, retrieved by them, from their own system. How can data that was already available with the Department be data that was "*suppressed*"?

30. Since we have held that the impugned SCN does not fulfill the requirements of the Section, the Respondent would also cease to have the benefit of an extended period of limitation for the purpose of its issuance.

IMPUGNED NOTICE IS NOT A SUPPLEMENTARY NOTICE:

31. The respondents, in Paragraph 9 of their Counter Affidavit, seek to derive sustenance from the notification dated 18 June 2019. Para 9 reads as follows:

> "9. The Respondents would also seek to highlight Notification 42/2019- Customs (NT) dated 18.06.2019 which provides for a supplementary notice to be issued once a notice under Section 28 or Section 124 of the Act has been issued. The circumstances in which such supplementary notices can be issued are as

follows:

i. In cases where there is a difference in the quantum of duty demanded in such cases;
ii. For invoking penal action against a person under the provisions of the Act in addition to those charged in the said notice;
iii. For invoking additional section / sections of the Act in such notice;
iv. In cases where there is additional evidence which may have a significant bearing on the case."

32. The Respondent, in the Counter, makes a bald averment without specifying under which of the said heads the impugned notice would fall. In view of the abject failure on behalf of the Respondents to state either in the SCN itself or even specify as to which of the four heads enumerated in the counter, the alleged impugned notice is being issued as a "*Supplementary Notice*", we are of the view that the said contention needs to be rejected.

33. Additionally, Section 28 of the Act, by its very nature posits, in a given set of facts and circumstances, the issuance of a SCN either under Section 28(1) or under Section 28(4) of the Act and not under both. Under the circumstances, we are unable to agree that the impugned SCN under section 28(4) of the Act post the issuance of the SCN under Section 28(1) could be termed a "*Supplementary Notice*".

34. While both parties also sought to address arguments on the classification of the goods, with the Respondent relying primarily upon Rule 2(a) of the General Rules for the Interpretation of the Harmonised Systems, since we are of the opinion, for the reasons stated above, that the impugned SCN dated 01 September 2023 under Section 28(4) of the Act is not maintainable, we do not propose to examine the said issue. Needless to state that the said question may be examined on merits by the concerned forum in appropriate

proceedings.

35. Resultantly, and for the reasons afore-stated, we are of the view that the impugned SCN under Section 28(4) is liable to be set aside.

36. We allow the Petition in the above terms and dispose of the pending application(s).

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

MARCH 07, 2025*/nd/er*